

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

EDDIE ANDREW WILLIAMS, III

PLAINTIFF

V.

NO. 2:96CV11-B-A

H.M. "MACK" GRIMMETT, ET AL.

DEFENDANTS

MEMORANDUM OPINION

This cause comes before the court on the defendants' motion to dismiss or, alternatively, motion for summary judgment. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

Motion to Dismiss

This action was brought pursuant to 42 U.S.C § 1983 to recover for the use of excessive deadly force on the part of the defendant deputy sheriffs in their official and individual capacities and for failure to train on the part of the defendant sheriff in his official and individual capacities.¹ The plaintiff's first amended complaint was filed as a reply to the individual defendants' affirmative defense of qualified immunity pursuant to Rule 7(a) of the Federal Rules of Civil Procedure. The defendants move to dismiss on the ground that the first amended complaint is legally insufficient to withstand the qualified immunity defense. "In considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), the district court must accept all well-pleaded

¹The plaintiff also seeks recovery from Providence Washington Insurance Company as defendant sheriff's surety.

facts as true and view them in the light most favorable to the plaintiff." Baker v. Putnal, 75 F.3d 190, 196 (5th Cir. 1996).

Qualified immunity "generally turns on the 'objective legal reasonableness' of the action...assessed in light of the legal rules that were 'clearly established' at the time it was taken." Anderson v. Creighton, 483 U.S. 635, 639, 97 L. Ed. 2d 523, 530 (1987) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 819, 73 L. Ed. 2d 396, 410-11 (1982)). The Fifth Circuit recently stated:

In assessing a claim of qualified immunity, this court engages in a two part analysis. The court first determines if the plaintiff has **alleged** a violation of a clearly established constitutional or statutory right. If so, the court then decides if the defendant's conduct was objectively reasonable.

Ganther v. Ingle, 75 F.3d 207, 210 (5th Cir. 1996) (emphasis added). The court finds that the first amended complaint alleges a violation of a clearly established constitutional right. It is clearly established that

if a law enforcement officer uses excessive force in the course of making an arrest, the Fourth Amendment guarantee against unreasonable seizure is implicated.

Harper v. Harris County, Texas, 21 F.3d 597, 600 (5th Cir. 1994).

At this pleading stage, the court must determine whether the plaintiff's allegations "'support[] his claim with sufficient precision and factual specificity to raise a genuine issue as to the illegality of defendant's conduct at the time of the alleged acts.'" Shultea v. Wood, 47 F.3d 1427, 1434 (5th Cir. 1995), quoted in Baker, 75 F.3d at 197. See Elliott v. Perez, 751 F.2d

1472, 1473, 1482 (5th Cir. 1985) (under the heightened pleading requirement, "a complaint [must] state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity"). The defendants contend that the first amended complaint is replete with conclusory allegations of constitutional violations and generalized legal conclusions. Upon review of the first amended complaint in its entirety, the court finds that the factual allegations of the specific circumstances, the description of the decedent's four gunshot wounds in the autopsy report and the allegations based on the autopsy report meet the heightened pleading requirement so as to overcome the defense of qualified immunity at the pleading stage. See Doe v. Hillsboro Indep. School Dist., 81 F.3d 1395, 1402 (5th Cir. 1996) (complaint read in its entirety). Accordingly, the motion to dismiss for failure to state a claim should be denied.

Alternative Motion for Summary Judgment

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing'... that there is an absence of evidence to support the nonmoving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the nonmovant to "go beyond the pleadings and by ... affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate

'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Rule 56(e). All legitimate factual inferences must be made in favor of the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the nonmovant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986).

The defendants alternatively move for summary judgment on the ground of qualified immunity. It is well settled:

Qualified immunity protects a police officer from liability [for civil damages] if a reasonable competent law enforcement officer would not have known that his actions violated clearly established law. Anderson v. Creighton, 483 U.S. 635, 639, 107 S. Ct. 3034, 3038, 97 L. Ed. 2d 523 (1987). The objective reasonableness of the officer's conduct is measured with reference to the law as it existed at the time of the conduct in question.

Harper, 21 F.3d at 600. See Elliott, 751 F.2d at 1477 n.13. To prevail on an excessive force claim, the plaintiff must show an

injury², 'which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively unreasonable." Stroik v. Ponseti, 35 F.3d 155, 157 (5th Cir. 1994) (quoting Reese v. Anderson, 926 F.2d 494, 500 (5th Cir. 1991)), cert. denied, 131 L. Ed. 2d 556 (1995). Objective reasonableness is determinative of the merits of the excessive force claim as well as the qualified immunity issue.³

The question is whether the deputies' use of deadly force was "'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Stroik, 35 F.3d at 158 (quoting Graham v. Connor, 490 U.S. 386, 397, 104 L. Ed. 2d 443, 456 (1989)). The court must examine the totality of the circumstances, particularly "whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether he [was] actively resisting arrest

²Under the current law, "[a] plaintiff is no longer required to prove significant injury to assert a section 1983 Fourth Amendment excessive force claim." Harper v. Harris county, Texas, 21 F.3d 597, 600 (5th Cir. 1994) (citing Hudson v. McMillian, 503 U.S. 1, 117 L. Ed. 2d 156 (1992)).

³The law has not changed since the time of the incident. Therefore, a finding that the deputies' conduct was objectively reasonable would preclude liability in both their official and individual capacities. Such a finding would also preclude the derivative claim against the defendant sheriff. See Smith v. Freland, 954 F.2d 343, 348 (6th Cir.), cert. denied, 504 U.S. 915, 118 L. Ed. 2d 557 (1992). In Freland, the defendant police officer moved for summary judgment on the ground of qualified immunity, asserting that he reasonably believed decedent threatened his safety. Id. at 345. Affirming summary judgment in favor of the officer, the court concluded: "Because Officer Schulez acted reasonably, [decedent's] rights were not violated. Thus, [the plaintiff] has no claim against [the defendant city or acting police chief]." Id. at 348.

or [was] attempting to evade arrest by flight." Graham, 490 U.S. at 396, 104 L. Ed. 2d at 455. The Supreme Court in Graham stated:

The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation.

490 U.S. at 396-397, 104 L. Ed. 2d 455-56, quoted in Stroik, 35 F.3d at 158.

Facts

The following facts are undisputed. On August 5, 1994, at approximately 11:45 p.m., in Bolivar County, Mississippi, Carl Ford, the decedent, crashed his nude body through the rear glass door of a home occupied by Mark Redden, his wife and two children. Ford damaged items in the house and when he turned toward Mark Redden as if he was going to start toward him, Redden fired one round from his .22 caliber pistol aiming at but missing Ford's knee. Ford ran from the front door area and into the master bedroom where he broke two windows and tore down the bed, and then entered the master bathroom. When Ford crashed through the glass door, an activated security system notified the Bolivar County Sheriff's Department. Bolivar County Deputies Charles McCool, Charles Gilmer, Ben Contreras, defendants, and Deputies Mark Kimball and Tom Harvey responded to the call. Defendants McCool and Gilmer⁴ located Ford in the master bathroom, naked and lying

⁴The defendants' itemization of material facts identifies only McCool and Gilmer but Contreras also stated in his offense report and Mississippi Highway Patrol interview that he also observed Ford

face down in the bathtub. According to Gilmer in his interview with the Mississippi Highway Patrol, Ford was lying on his hands. The defendant deputies commanded Ford to show his hands and step out of the bathtub.⁵ Contreras stated in his interview that Ford "jumped out of the bathtub screaming, yelling" (p.3). The interviews with Gilmer (p.8) and McCool (p.1) suggest that, at most, only Ford's right hand was hidden at this time. Gilmer fired one shot and McCool fired one shot at Ford who then closed the bathroom door.⁶ Approximately two or three minutes after Deputy Gilmer radioed for additional units for assistance, he opened the bathroom door. The defendant deputies claim that after Gilmer opened the door, Ford began to move in a threatening manner toward the deputies with his right hand concealed behind him and refusing to comply with commands to show his hand and lie down on the floor. The defendant deputies opened fire on Ford, fatally wounding him.

The Redden family had been removed from the house. Blood samples collected from Ford's body were positive for cocaine metabolite.⁷ The autopsy report describes four gunshot wounds: two lethal wounds in the chest, one wound in the inguinal (groin) area, and one wound in the right forearm. One of the chest wounds

face down in the bathtub.

⁵The plaintiff contests the defendants' itemization no. 11 that Ford began to lunge forward with his **hands** hidden from view.

⁶The defendants claim that at this time Ford sustained a gunshot wound in the leg area. See defendants' itemization no. 11.

⁷The plaintiff asserts that the defendant deputies had no knowledge of this fact at the time of the shootings.

represents a "reentry gunshot wound." The report further states: "The angles of trajectory [of the gunshot wound in the right forearm] are...anterior to posterior" and "[t]he projectile... exit[ed] on the posterior surface of the arm."

The reasonableness test under the Fourth Amendment "requires careful attention to the facts and circumstances of each particular case." Graham, 490 U.S. at 396, 104 L. Ed. 2d at 455, quoted in Smith v. Freland, 954 F. 2d at 346. The defendants contend that the deputies' conduct was objectively reasonable under the totality of the circumstances. In an effort to establish genuine issues of material fact, the plaintiff has submitted the affidavit of Rodrigo M. Galvez, M.D., analyzing the autopsy report and opining that Ford's right forearm could not have been behind his back at the time of the fatal shootings, and the affidavit of Bill Myers, offering expert opinion testimony as to the issue of objective reasonableness. The defendants, in their rebuttal memorandum, move to strike these affidavits on the ground of noncompliance with Rule 56(e) of the Federal Rules of Civil Procedure. The defendants further object to Myers' affidavit on the grounds that it contains, inter alia, conclusory, argumentative and speculative statements.

Upon due consideration, the court finds that the court need not address the objections to the affidavits; without the benefit of either affidavit, the court finds that there are genuine issues of material fact as to whether the defendant deputies' shootings were objectively reasonable. For instance, there is a question of material fact, based on the description of the gunshot wounds in

the autopsy report,⁸ as to the veracity of the deputies' version with regard to the visibility of Ford's right hand and the possible concealment of a weapon before the fatal shootings. Cf. Stroik, 35 F.3d at 159 (judgment as a matter of law granted to police officer whose "life was actually in jeopardy when he shot" robbery suspect who was pointing a gun at him); Smith v. Freland, 954 F.2d at 347 (summary judgment granted to officer who fatally shot a suspect while attempting to escape officer's blockade in a speeding car following a high-speed car chase); Reese v. Anderson, 926 F.2d 494, 500-501 (5th Cir. 1991) (summary judgment granted to officer who shot a robbery suspect in a car's front passenger seat who repeatedly raised and then lowered his left hand in defiance of officer's orders). Since there are disputed issues of material fact concerning the qualified immunity defense, the motion for summary judgment is not well taken and should be denied.

An order will issue accordingly.

THIS, the _____ day of August, 1996.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE

⁸See Baulch v. Johns, 70 F.3d 813, 815 (5th Cir. 1995) (autopsy report created genuine issue of material fact).